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Chia Siew Hock v Chia Seow Gim & Anor

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(NCVC)(W)-595–03 OF 2019
LAU BEE LAN, ABU BAKAR AND GUNALAN MUNIANDY JJCA
19 APRIL 2021

C *Companies and Corporations — Shares — Sale of shares — Appellant claimed proceeds of sale of shares against respondents based on agreement and resolution — Respondents counterclaimed for declaration that resolution was null and void — High Court dismissed claim and allowed counterclaim — Whether High Court rightly rejected claim — Whether High Court gone completely wrong in*
D *findings of fact and approval of evidence that led to erroneous conclusion as to sustainability of claim*

This was the appellant's ('the plaintiff') appeal against the High Court's decision in dismissing the plaintiff's claim and allowing the respondents' ('the
E defendants') counterclaim with costs. The defendants were the younger brothers of the plaintiff. The plaintiff and the defendants directly and/or indirectly owned all shares in two family companies, Greengage Sdn Bhd ('Greengage') and Buntar Quarry Sdn Bhd ('Buntar Quarry') save for 5% shares in Buntar Quarry which was held by one Chong Yoke Loong, their plant
F manager. By two sale and purchase of shares agreements ('the SPAs'), the entire shareholdings in the two companies were sold to Ace Destination Sdn Bhd for a total declared price of RM30m (RM28m for Greengage and RM2m for Buntar Quarry). The plaintiff's pleaded case was that there was an agreement between the plaintiff and the defendants sometime in March 2017 wherein the
G plaintiff would get RM16m out of RM30m. Part of the said agreement was subsequently reduced into writing and contained in and evidenced by a Members' Circular Resolution of Greengage ('the resolution') signed by the plaintiff and the defendants. The plaintiff claimed against the defendants for, inter alia, the following reliefs: (a) a declaration that all the monies in the joint
H account were held in trust for the plaintiff and the defendants, out of which the plaintiff was entitled to RM15,057,200; (b) the defendants did jointly and severally pay a sum of RM15,057,200 to the plaintiff; and (c) an order for injunction to restrain the defendants either by themselves or through their agents or servants from paying, withdrawing or transferring any money from
I the said account to the extent of causing the total deposit to be less that RM15,057,200 until after the defendants had paid the total sum of RM15,057,200 to the plaintiff. The defendants counterclaimed for, inter alia, a declaration that the said resolution was null and void. The proceeds of sale should be distributed in accordance with the percentage of each party's

shareholding. The learned high court judge ('LHCJ') dismissed the plaintiff's claim and allowed the defendants' counterclaim and ordered that the balance sum of RM9,417,200 be distributed based on the respective shareholdings. Hence, this appeal by the plaintiff. A

Held, dismissing the appeal with costs: B

(1) Despite alleging the existence of an oral agreement by the defendants and his reliance on the purported resolution, the plaintiff had not sought for an order for specific performance of any such alleged agreement or the terms of the purported resolution. The plaintiff did not seek an order of C specific performance as there was probably no such alleged agreement between the plaintiff and the first defendant as it was inconceivable why the first defendant would agree to the plaintiff getting RM16m when the plaintiff's shareholding in Greengage and Buntar Quarry indirectly only amounted to about 19% which was worth only RM5.7m. Based on the D several discrepancies, amongst others, concerning the plaintiff's entitlement to the joint venture land of Lot 5063 which was a bumiputra lot, the alleged oral agreement in all probability never took place. There was absolutely no reason for the first defendant to have agreed to such a huge portion of the proceeds being surrendered to the plaintiff (see E paras 27–28, 41 & 46).

(2) There was no serious flaw in the reasoning of LHCJ as to why the company secretary ('PW1') should be viewed as a witness who was not credible and neutral, whose evidence had to be viewed with caution. F Likewise, there was no obvious flaw in the LHCJ's view that the defendants as registered shareholders of Greengage and Buntar Quarry were the vendors of the properties and were entitled to receive payments of the purchase price in accordance with their respective shareholding. It was totally justified for the LHCJ to find that it was most unlikely and G incredible for the first and second defendant to have agreed to part with whopping RM16m from the price of RM30m to the plaintiff which would have the effect of them losing their entitlements according to their shareholding and the terms of the written agreement. The terms of payments mentioned in the resolution were in direct contrast to the H intention of the parties reflected in the SPA and therefore, the resolution should be considered null and void. The LHCJ did not make a wrong finding that, in view of cl 5.3 of the SPAs, the plaintiff could not now via his claim seek to recover monies allegedly due to him from the two companies having agreed to absolutely assign all the said debts to the I purchaser. The LHCJ finding that it was against public policy and possibly, also illegal, for Lot 5065 to be transferred to a non-bumiputra was not an erroneous view. Furthermore, Lot 5065 did not belong to the defendants. Hence, it did not make sense for them to have agreed or

promised to give the same to the plaintiff pursuant to the agreement as spelt out in the purported resolution (see paras 56–59 & 61–62).

(3) The LHCJ's conclusion was based on a proper and reasonable appraisal of the evidence and not contrary to the weight of the overall evidence on the issue at hand. The plaintiff had failed to prove the existence of the alleged oral agreement pursuant to s 101 of the Evidence Act 1950 as, amongst others, the purported resolution did not support the alleged oral agreement at all. There was no serious error in the finding of fact by the LHCJ that the purported resolution must in all probability have been fraudulently obtained. The LHCJ had correctly interpreted the purported resolution and considered the pleaded oral agreement in concluding that the terms of the agreement and the resolutions were riddled with inconsistencies. The breach of s 298(1) of the Companies Act 2016 had been proved which rendered it not binding on and not enforceable, against all the shareholders of Greengage and Buntar Quarry. There were unresolved inconsistencies between the terms of the purported resolution and the alleged agreement as pleaded. The alleged agreement was an afterthought to validate a resolution that was unlawfully procured. It had been fraudulently obtained on credible grounds (see paras 84, 90, 92–93, 97 & 102).

(4) The LHCJ had properly utilised the audio-visual advantage that she had and had kept in mind relevant considerations based on the totality of the evidence and had not taken into account any irrelevant considerations in arriving at her decision. She had also applied the correct principles of law in evaluating the evidence and credibility of witnesses. The appellant had not demonstrated to the court that the LHCJ had misdirected herself as contended. Neither was it shown that she had failed to judicially appreciate and evaluate the evidence. Therefore, there was no plain error of law or fact by the LHCJ in deciding to dismiss the appellant's claim and allow the respondents' counterclaim that would warrant the court's intervention on appeal (see paras 104–105).

[Bahasa Malaysia summary

Ini adalah rayuan perayu ('plaintif') terhadap keputusan Mahkamah Tinggi dalam menolak tuntutan plaintif dan membenarkan tuntutan balas responden ('defendan') dengan kos. Defendan adalah adik-adik lelaki plaintif. Plaintif dan defendan secara langsung dan/atau tidak langsung memiliki semua saham dalam dua syarikat keluarga, Greengage Sdn Bhd ('Greengage') dan Buntar Quarry Sdn Bhd ('Buntar Quarry') kecuali 5% saham dalam Buntar Quarry yang dipegang oleh satu Chong Yoke Loong, pengurus kilang mereka. Melalui dua perjanjian jual beli saham ('SPA'), keseluruhan pegangan saham dalam kedua syarikat tersebut dijual kepada Ace Destination Sdn Bhd dengan harga yang diisytiharkan sebanyak RM30 juta (RM28 juta untuk Greengage dan RM2 juta untuk Buntar Quarry). Kes yang diplidkan oleh plaintif adalah

bahawa terdapat perjanjian antara plaintif dan defendan pada bulan Mac 2017 di mana plaintif akan mendapat RM16 juta daripada RM30 juta. Sebahagian daripada perjanjian tersebut kemudian diubah ke dalam bentuk bertulis dan terkandung dalam dan dibuktikan oleh Resolusi Pekeliling Ahli Greengage ('resolusi') yang ditandatangani oleh plaintif dan defendan. Plaintif menuntut terhadap defendan untuk, antara lain, relif berikut: (a) perisytiharan bahawa semua wang dalam akaun bersama itu dipegang atas amanah bagi plaintif dan defendan, yang mana plaintif berhak berjumlah RM15,057,200; (b) defendan membayar secara bersama dan berasingan sejumlah RM15,057,200 kepada plaintif; dan (c) perintah injunksi untuk menahan defendan sama ada oleh mereka sendiri atau melalui ejen atau pegawainya daripada membayar, mengeluarkan atau memindahkan wang dari akaun tersebut sehingga menyebabkan jumlah deposit kurang daripada RM15,057,200 sehingga selepas defendan telah membayar sejumlah RM15,057,200 kepada plaintif. Defendan menuntut balas, antara lain, perisytiharan bahawa resolusi tersebut adalah batal dan tidak sah. Hasil penjualan harus diagihkan sesuai dengan peratusan pegangan saham setiap pihak. Hakim mahkamah tinggi yang bijaksana ('LHCJ') menolak tuntutan plaintif dan membenarkan tuntutan balas defendan dan memerintahkan agar jumlah baki RM9,417,200 diedarkan berdasarkan pegangan saham masing-masing. Oleh itu, rayuan ini oleh plaintif.

Diputuskan, menolak rayuan dengan kos:

(1) Meskipun mendakwa adanya perjanjian lisan oleh defendan dan kebergantungannya pada resolusi yang dicadangkan, plaintif tidak memohon perintah untuk pelaksanaan spesifik terhadap perjanjian yang didakwa atau terma resolusi yang dicadangkan. Plaintif tidak memohon perintah pelaksanaan spesifik kerana mungkin tidak ada persetujuan yang didakwa antara plaintif dan defendan pertama kerana tidak dapat difahami mengapa defendan pertama akan bersetuju dengan plaintif mendapat RM16 juta ketika pemegangan saham plaintif di Greengage dan Buntar Quarry secara tidak langsung hanya berjumlah sekitar 19% yang bernilai hanya RM5.7 juta. Berdasarkan beberapa perbezaan, antara lain, mengenai hak plaintif atas tanah usaha sama Lot 5063 yang merupakan lot bumiputra, kemungkinan perjanjian lisan itu tidak pernah berlaku. Sama sekali tidak ada alasan bagi defendan pertama untuk menyetujui sebahagian besar hasil diserahkan kepada plaintif (lihat perenggan 27–28, 41 & 46).

(2) Tidak ada kesalahan serius dalam alasan LHCJ mengapa setiausaha syarikat ('PW1') harus dilihat sebagai saksi yang tidak dapat dipercaya dan neutral, yang keterangan harus dilihat dengan hati-hati. Begitu juga, tidak ada kesalahan yang jelas dalam pandangan LHCJ bahawa defendan sebagai pemegang saham berdaftar Greengage dan Buntar Quarry adalah penjual hartanah dan berhak menerima pembayaran harga pembelian

sesuai dengan pegangan saham masing-masing. Adalah wajar bagi LHCJ untuk menemui bahawa tidak mungkin dan luar biasa bagi defendan pertama dan kedua untuk bersetuju untuk mengasingkan dengan RM16 juta daripada harga RM30 juta kepada plaintif yang akan mengakibatkan mereka kehilangan hak menurut pegangan saham mereka dan terma perjanjian bertulis. Terma pembayaran yang disebutkan dalam resolusi bertentangan secara langsung dengan niat pihak-pihak yang tercermin dalam SPA dan oleh itu, ketetapan tersebut harus dianggap batal. LHCJ tidak membuat keputusan yang salah bahawa, berdasarkan klausa 5.3 SPA, plaintif sekarang tidak dapat melalui tuntutannya untuk mendapatkan wang yang didakwa terhutang kepadanya daripada dua syarikat yang telah bersetuju untuk sepenuhnya menyerahkan semua hutang tersebut kepada pembeli. Pendapat LHCJ bahawa bertentangan dengan dasar awam dan mungkin juga menyalahi undang-undang, kerana Lot 5065 dipindahkan ke bukan bumiputra bukanlah pandangan yang salah. Selanjutnya, Lot 5065 bukan milik defendan. Oleh itu, tidak masuk akal bagi mereka untuk menyetujui atau berjanji untuk memberikan hal yang sama kepada plaintif berdasarkan perjanjian seperti yang dinyatakan dalam resolusi yang dicadangkan (lihat perenggan 56–59 & 61–62).

(3) Kesimpulan LHCJ didasarkan pada penilaian keterangan yang tepat dan munasabah dan tidak bertentangan dengan berat keseluruhan keterangan mengenai isu yang sedang dihadapi. Plaintif gagal membuktikan kewujudan perjanjian lisan yang didakwa menurut s 101 Akta Keterangan 1950 kerana, antara lain, resolusi yang dicadangkan tidak menyokong perjanjian lisan itu. Tidak ada kesalahan yang serius dalam penemuan fakta oleh LHCJ bahawa resolusi yang dinyatakan mungkin telah diperolehi secara palsu. LHCJ telah menafsirkan dengan tepat resolusi yang dicadangkan itu dan mempertimbangkan perjanjian lisan yang diplid dengan menyimpulkan bahawa terma perjanjian dan resolusi itu dipenuhi dengan percanggahan. Pelanggaran s 298(1) Akta Syarikat 2016 telah dibuktikan yang menjadikannya tidak mengikat dan tidak dapat dilaksanakan, terhadap semua pemegang saham Greengage dan Buntar Quarry. Terdapat percanggahan yang tidak dapat diselesaikan antara terma resolusi yang dicadangkan dan perjanjian yang didakwa seperti yang diplid. Perjanjian yang didakwa itu adalah suatu yang telah difikirkan kemudian untuk mengesahkan resolusi yang tidak sah. Ia diperoleh secara palsu dengan alasan yang boleh dipercayai (lihat perenggan 84, 90, 92–93, 97 & 102).

(4) LHCJ telah memanfaatkan kelebihan audio-visual yang dimiliki dan mengingat pertimbangan yang relevan berdasarkan keseluruhan keterangan dan tidak mempertimbangkan pertimbangan yang tidak relevan untuk mengambil keputusannya. Beliau juga telah menerapkan prinsip undang-undang yang betul dalam menilai bukti dan kredibiliti

saksi. Perayu tidak menunjukkan kepada mahkamah bahawa LHCJ telah tersalah arah dirinya sebagaimana yang dikatakan. Juga tidak ditunjukkan bahawa beliau gagal menghargai dan menilai keterangan secara adil. Oleh itu, tidak ada kesalahan undang-undang atau fakta yang jelas oleh LHCJ dalam memutuskan untuk menolak tuntutan perayu dan membenarkan tuntutan balas responden yang memerlukan campur tangan mahkamah atas rayuan (lihat perenggan 104–105).]

Cases referred to

Curtis v Chemical Cleaning and Dyeing Co Ltd [1951] 1 All ER 631, CA (refd)
Kelapa Sawit (Telok Anson) Sdn Bhd v Yeoh Kim Leng & Ors [1991] 1 MLJ 301, SC (refd)
L'Estrange v F Graucob Ltd [1934] 2 KB 394 (refd)
Tan Ah Kow & Anor v Tan Chaui En [2017] 6 MLJ 297; [2018] 2 CLJ 610, CA (refd)

Legislation referred to

Companies Act 2016 ss 297, 298(1)
Evidence Act 1950 ss 10, 10(b), 101, 102, 102(b)

Appeal from: Civil Suit No PA-22NCVC-125–06 of 2017 (High Court, Pulau Pinang)

YC Wong (Jean Au with him) (YC Wong) for the appellant.
Dominic Pillay (Karin Lim with him) (Presgrave & Matthews) for the first respondent.
Tan Wei Ceat (Chen Su Wun with him) (Tan Wei Ceat & Co) for the second respondent.

Gunalan Muniandy JCA:

INTRODUCTION

[1] This is the appellant/plaintiff's appeal against the High Court's decision in dismissing the appellant's claim and allowing the respondents/defendants' counterclaim with costs.

BACKGROUND FACTS

[2] The respondents are the younger brothers of the appellant. The appellant and the respondents directly and/or indirectly owned all shares in two family companies, Greengage Sdn Bhd ('Greengage') and Buntar Quarry Sdn Bhd ('Buntar Quarry') save for 5% shares in BQ which was held by one Chong Yoke Loong ('CYL'), their plant manager.

[3] By two sale and purchase of shares agreements dated 30 March 2017 and 31 March 2017 ('SPAs'), the entire shareholdings in the two companies were sold to Ace Destination Sdn Bhd ('Ace Destination') for a total declared price of RM30m (RM28m for Greengage and RM2m for Buntar Quarry).

[4] The appellant's pleaded case is that there was an agreement between the appellant and the respondents sometime in March 2017 wherein the appellant would get RM16m out of RM30m. Part of the said agreement was subsequently reduced into writing and contained in and evidenced by a Members' Circular Resolution of Greengage dated 15 March 2017 ('Resolution') signed by the appellant and the respondents.

[5] The appellant claimed against the respondents for the following reliefs:

(1) a declaration that all the monies in the joint account are held in trust for the plaintiff and the defendants, out of which the plaintiff is entitled to RM15,057,200;

(2) an order that the defendants shall do all necessary things to cause the sum of RM15,057,200 to be paid from the said account to the plaintiff within seven days from the date of this order;

(3) in the alternative to para (2) above, the defendants do jointly and severally pay a sum of RM15,057,200 to the plaintiff;

(4) an order for injunction to restrain the defendants either by themselves or through their agents or servants from paying, withdrawing or transferring any money from the said account to the extent of causing the total deposit to be less that RM15,057,200 until after the defendants have paid the total sum of RM15,057,200 to the plaintiff;

(5) general damages against the defendants for breach of trust;

(6) exemplary damages against the defendants;

(7) interest on the sum of RM15,057,200 at the rate of 5%pa calculated from the date of filing of this action until full satisfaction;

(8) costs on indemnity basis; and

(9) other relief deems fit by the court.

[6] The respondents counterclaimed for, inter alia, a declaration that the said resolution is null and void. The proceeds of sale should be distributed in accordance with the percentage of each party's shareholding.

[7] The learned High Court judge ('LHCJ') dismissed the appellant's claim with costs and allowed the respondents' counterclaim with costs and ordered that the balance sum of RM9,417,200 be distributed based on the respective

shareholdings. The appellant was ordered to pay costs in the sum of RM60,000 to each of the respondents.

FINDINGS OF THE HIGH COURT

[8] The LHCJ held that PW1 who prepared the resolution is not a credible witness. PW1 was working hand in glove with the appellant. PW1 is only a company secretary and he should be a neutral person and not take sides. The LHCJ also held that the entitlement and shareholding carried the same meaning. The respondents are the registered owners of the shares in Greengage and Buntar Quarry. The percentage of their shareholding is expressly stated in cl 3 of the sale and purchase agreements and entitled to receive payments of the purchase price based on the number of shares they sold.

[9] It is impossible for the first respondent to agree giving RM16m to the appellant when the appellant's entitlement is less than RM6m and the first respondent's entitlement is RM17m. Why would the first respondent want to give away extra RM10m when the terms in the sale and purchase agreement ('SPAs') are clear. Parties are bound by the terms of the agreement.

[10] The resolution did not state in what percentage or proportion the proceeds are to be distributed. The terms of payment set out in the alleged resolution are most unfair and would create tensions and hatred between the respondents and the appellant. The LHCJ concluded that that the resolution is null and void and of no effect.

[11] The appellant alleged that his claim for RM16m includes debts owing by the companies to him and one Chia Cheng Ho Sdn Bhd ('CCH'). However, pursuant to cl 5.3 (c) of the agreements, the appellant as vendor had agreed to assign all the monies due to him to the purchaser absolutely. Therefore, the appellant cannot claim any debt from the two companies.

THE APPELLANT'S SUBMISSION

[12] The appellant submitted that the LHCJ erred in law and in fact in failing to hold that the resolution signed by the parties constitutes prima facie evidence of the respondents' agreement that the appellant was to be paid RM16m. The burden falls on the respondents to prove their allegation that the signatures on the resolution were obtained by fraud.

[13] The LHCJ has misconstrued the provisions of the sale and purchase of shares agreements. The LHCJ is rewriting the share sale agreements by reading into them what is not there based on her own preconception. The LHCJ's decision is not supported by the clear wording of the said provisions. Instead,

the mode of payment as per cl 2.4, that is, by cheques to be deposited into a joint account supports the appellant's version that parties had a separate agreement as to how to distribute the proceeds.

THE RESPONDENTS' SUBMISSION

[14] The first respondent ('R1') submitted as follows:

(a) it is not disputed that the relationship between the appellant and the R1 at the material time was already not good. As such there is no reason why the R1 would have agreed to the appellant getting RM16m as contended by the appellant vide the resolution dated 15 March 2017;

(b) a comparison between the terms of the alleged agreement as pleaded by the appellant (in para 7 of the statement of claim) and the purported resolution would reveal that they are riddled with inconsistencies. The R1 contended that there was no such alleged agreement and the terms therein are an afterthought by the appellant;

(c) at all material times, the proceeds of the sale of shares in both Greengage and Buntar Quarry are to be distributed based on the shareholding percentages of the respective shareholders in both companies; and

(d) the terms of the resolution are inconsistent with the terms of the sale and purchase agreements. If the resolution was genuine, it would have been referred to in the SPAs dated 30 March 2017 and 31 March 2017 which both were executed after the resolution. The R1 also contended that the purported resolution was obtained fraudulently by the appellant.

[15] The second respondent ('R2') contended that the appellant has failed to prove the existence of the alleged oral agreement made sometime in or about March 2017. The alleged oral agreement also contradicts with content of the purported resolution.

[16] R2 submitted that the Greengage and Buntar Quarry have different shareholders and directors. Both companies are separate and distinct legal entities. Therefore, the purported resolution cannot be binding on the respective shareholders and companies.

OUR DECISION

[17] It is first and foremost noteworthy that the appellant/plaintiff's pleaded claim hinged primarily on the existence of the alleged oral agreement with the respondents/defendants for the former to be paid RM16m after paying RM100,000 to one Chong Yoke Loong ('CYL') and secondly, on the validity of the Members Circular Resolution dated 15 March 2017 ('Resolution').

[18] The resolution was of paramount importance to the plaintiff's claim in that the appellant/plaintiff had adduced members' circular resolution of Greengage Sdn Bhd ('Greengage') dated 15 March 2017 which states that the appellant/plaintiff's consideration for his share in Greengage and Buntar Quarry inclusive of debts owing by the Greengage to him shall be RM16m and the joint venture land of Lot 5063 (bumiputra lot). A B

[19] It was crucial to note that the respondents' ('R1 & R2') defence case was that the purported oral agreement was not in existence and hence, that there was no enforceable agreement between the three siblings wherein the plaintiff was entitled to be paid RM16m upon payment of the amount due of RM100,000 to CYL. C

[20] For ease of reference, it would be useful to reproduce the said oral agreement as per para 7 of the statement of claim as follows: D

> 7. Sometime in or about March 2017, upon request of the Defendants and in consideration of the Defendants agreeing that the Plaintiff should receive inter alia a total sum of RM16 million for the sale of all his share in Greengage and all his family company's shares in Buntar regardless of the total consideration for the sale of the entire shareholdings in Greengage and Buntar ('the said companies'), the Plaintiff agreed to sell all his shares in Greengage and all his family company's shares in Buntar to a purchaser designated by the Defendants to enable the shareholders of the said companies to dispose off the entire shareholdings in the said companies to the said purchaser. E
>
> 7.1 The Defendants informed the Plaintiff that the total consideration for the sale of the entire shareholdings in the said companies would be RM30 million. F
>
> 7.2 The Defendants also agreed that they would accept and share between them, as their portion of the total consideration for such sale, the balance of the consideration after deducting the said sum of RM16 million payable to the Plaintiff and after paying the said Chong Yoke Loong his due amounting to RM100,000.00 ('the said balance consideration'). G

[21] It was the plaintiff's pleaded case that the crucial oral agreement had been reduced into writing and was recorded as evidenced by the resolution of Greengage dated 15 March 2017. However, the plaintiff took no steps to enforce the alleged oral agreement by commencing an action for that purpose. H

[22] As highlighted by R1, instead of suing for specific performance of the alleged agreement, the plaintiff via the instant action instead sought the following declaratory and consequential reliefs: I

> (1) A declaration that all the monies in the joint account of the Plaintiff and the Defendants at RHB Bank Berhad with account no.

A 202032-000-50490 ('the said account') are held on trust for the Plaintiff and the Defendants, out of which the Plaintiff is entitled to RM15,057,200.00;

(2) An order that the Defendants shall do all necessary thing to cause the sum of RM15,057,200.00 to be paid from the said account to the Plaintiff within 7 days from the date of this order;

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(3) In the alternative to paragraph (2) above, the Defendants do jointly and severally pay a sum of RM15,057,200.00 to the Plaintiff;

(4) An order for injunction to restrain the Defendants either by themselves or through their agents or servants from paying, withdrawing or transferring any money from the said account to the extent of causing the total deposit to be less than RM15,057,200.00 until after the Defendants have paid the total sum of RM15,057,200.00 to the Plaintiff;

C

(5) General damages against the Defendants for breach of trust;

D

(6) Exemplary damages against the Defendants;

(7) Interest on the sum of RM15,057,200.00 at the rate of 5% per annum calculated from the date of filing of this action until full realization;

(8) Costs on indemnity basis; and

E

(9) Further or other relief as this Honourable Court deems fit and proper.

[23] Consistent with the defendants' respective statements of defence and the testimonies of their witnesses, the defendants contended in resisting the plaintiffs' claim that the proceeds of the sale of shares in both Greengage and Buntar Quarry should be distributed based on the shareholding of the shareholders in both the companies prior to the sale of both the companies' shares and that the plaintiff is not entitled to the sum RM15,057,200 as set out in the statement of claim or any other sum in excess of his shareholding in Greengage and Buntar Quarry.

F

G

[24] This contention was duly upheld by the LHCJ for reasons that will be dealt with in our judgment.

H

[25] The R1 denied any agreement on his part as alleged by the plaintiff that the plaintiff is entitled to receive the total sum of RM16m from the sale of shares in Greengage and the joint venture land rights to Lot 5065 as claimed by the plaintiff.

I

[26] Instead, R1 contended that the resolution dated 15 March 2017 relied upon by the plaintiff as the basis of his claim herein:

(a) is inconsistent with the terms of the sale and purchase agreement ('SPAs'), contemporaneous documents and conduct of parties;

(b) is illegal, null and void and contrary to public policy; and

(c) was fraudulently obtained by the plaintiff.

[27] A relevant fact that, in our view, was correctly highlighted by R1 was that despite alleging the existence of an oral agreement by the defendants that the plaintiff shall be entitled to Buntar Quarry (and Lot 5065) and his reliance on the purported resolution, the plaintiff has not sought for an order for specific performance of any such alleged agreement or the terms of the purported resolution.

[28] There was, in our view, basis for R1's contention that the plaintiff did not seek an order of specific performance as there was probably no such alleged agreement between the plaintiff and the R1 as it is inconceivable why the R1 would agree to the plaintiff getting RM16m when the plaintiff's shareholding in Greengage and Buntar Quarry (indirectly) only amounts to about 19% which is worth only RM5.7m.

[29] R2 likewise stressed that the plaintiff had failed to prove the existence of the alleged oral agreement primarily because there are discrepancies and inconsistencies between the alleged oral agreement and the purported resolution.

[30] Several discrepancies and inconsistencies as stated above were brought to our attention.

[31] Amongst others, the entire alleged oral agreement as pleaded by the plaintiff does not mention anything about the bumiputra lot nor the joint venture right to the bumiputra lot, whereas the purported resolution does mention that the appellant/plaintiff is entitled to the joint venture land of Lot 5065 (bumiputra lot).

[32] Under cross-examination, the plaintiff ('PW3') insisted that he is entitled to the bumiputra lot which appears to be inconsistent with the alleged oral agreement that is silent on the bumiputra lot; whereas the purported resolution makes no mention about the joint venture right to the bumiputra lot but only to PW3's entitlement to the said lot.

[33] PW3's testimony further contradicted the terms of the alleged oral agreement when he initially testified that he did not know about the joint venture right which is not mentioned in the oral agreement and subsequently, when he was further cross-examined he testified that he also intended to claim the joint venture right by virtue of the said oral agreement.

[34] To resist the plaintiff's claim, the defendants relied substantially on the lack of credibility of PW3 in view of the glaring inconsistencies between the pleaded oral agreement, the purported resolution and his evidence in court.

[35] PW3's curious stand was that he was entitled to claim whatever rights were provided to him under the resolution irrespective of whether he had claimed the same in his pleading which would include the Malay Reserve or bumiputra lot. He, however, admitted that the joint venture right to the bumiputra lot is not mentioned in the resolution.

[36] Neither did he even know about the existence of this purported right to the bumiputra lot. Despite this admission, he gave contradictory evidence at a later stage of the cross-examination when he insisted that he had asked to be given this purported right to the said lot in the oral arrangement with the defendants.

[37] We take serious note of the position taken by both R1 and R2 that on the totality of the evidence presented by the plaintiff there was no such alleged agreement as pleaded by the plaintiff in para 7 of the SOC which R1 contended is an afterthought by the plaintiff to overcome the obvious inconsistencies, vagueness and discrepancies in the purported resolution, which the appellant/plaintiff in our case claims is the alleged agreement in written form.

[38] Rightly, considering the pleaded case of the plaintiff, the terms of the MCR should mirror the terms that the parties had allegedly agreed to as pleaded in para 7 of the SOC instead of being riddled with inconsistencies that surfaced in this instance. Thus, an explanation for the contradictions as attempted by PW1 should be objectively considered to ascertain the truth of his version.

[39] As pointed out to us, PW1 did attempt to explain the above-mentioned inconsistencies by saying that it was a rush job wherein he claimed that he had spoken to both the plaintiff and R1 on 14 March 2017 over the phone regarding the same and had subsequently approached the defendants and the plaintiff to sign the purported resolution at his office the next day, ie, on 15 March 2017 (which the defendants deny). DW1 testified that he was a company secretary with over 20 year experience. If such was the case, PW1 would certainly have had no difficulty in reducing into writing the terms agreed upon in the alleged oral agreement in the form of a shareholders' resolution which in our case is the purported resolution. However, there were obvious inconsistencies in this instance between the said agreement and the terms of the resolution which were not resolved in the plaintiff's case.

[40] The weight of evidence, thus, lends credence to the respondents'

contention that the only reasonable inference has to be that the alleged oral agreement was non-existent and merely an afterthought on the plaintiff's part to sustain his claim.

[41] We, therefore, concur with the respondents' contention that based on the several discrepancies that have been highlighted to us, amongst others, concerning the plaintiff's entitlement to the bumiputra lot, the alleged oral agreement in all probability never took place. PW3's allegation that the said agreement was reduced into writing via the purported Resolution was denied by R2 whose evidence was more credible in view of the agreement being materially inconsistent with the resolution.

[42] The plaintiff sought to, inter alia, rely on s 10, Illustration (b) of the Evidence Act 1950 ('the EA') to prove his case. We are in agreement with R1's contention that the reliance on the said provision is totally unfounded and misguided as the plaintiff in our case has not proven the alleged agreement as pleaded by the plaintiff in para 7 of SOC.

[43] We have also noted that the plaintiff was neither claiming for specific performance of the alleged agreement nor the purported resolution. R1 contended on sound basis that this was so because the plaintiff knew that it would not be able to prove either the alleged agreement nor the purported resolution in court and had, therefore, instead sought declaratory relief that the monies in the joint account were held in trust for the plaintiff and the defendants and that the plaintiff allegedly was entitled to RM15,057,200 thereby attempting to cloud the issue of the said inconsistencies as already addressed.

[44] Notably, neither the alleged agreement nor the purported resolution was referred to in any of the contemporaneous documents by the plaintiff or PW1 prior to the filing of this suit and the ex parte application for an interim injunction. It rendered the existence of both at the material time improbable and unlikely.

[45] Further, R1 highlighted to us certain key facts that threw grave doubt on the existence of the same. Briefly, these are:

(a) various letters and police reports by the plaintiff and PW1 in their attempts to stop the defendants from distributing the balance consideration from the proceeds of sale of shares in Greengage and Buntar Quarry to the companies' shareholders on their respective shareholdings whereas nowhere is the alleged agreement or the purported resolution mentioned even once in the SPAs;

(b) the terms of the purported resolution were not referred to anywhere in the SPAs that was entered into some two weeks after the purported resolution. PW1, who acknowledged receiving a copy of the draft SPAs admitted during cross examination that the terms of the purported resolution (which was drafted by him earlier) could have been easily put into the SPAs; and

(c) the non-reference of the purported resolution by both PW1 and plaintiff prior to the commencement of this suit could lead to the inference that it was probably obtained from D1 fraudulently. The plaintiff only referred to this when seeking an injunction against the defendants to prevent the distribution of balance consideration based on shareholding. According to D1, it was because the said resolution was null and void and incapable of being specifically enforced.

[46] It was also important for us to note that the plaintiff's claim for RM16m out of the RM30m from the proceeds of the sale of shares of Buntar Quarry and Greengage would work out to a whopping 53.3% whereas based on his 19% shareholding he was only entitled to about RM5.7m and hence, as correctly found by the LHCJ there was absolutely no reason for D1 to have agreed to such a huge portion of the proceeds being surrendered to the plaintiff.

[47] As to the purported resolution, the plaintiff had only disclosed it to PW6, one Ms Sim Wee Lee (the RHB Bank branch manager) who had shown it to the defendants during their meeting with her on 9 June 2017. She had done so, as she was, according to R1, in collusion with the plaintiff and PW1 to prevent the defendants from distributing the balance consideration based on the shareholding.

[48] In view of the relationship of PW1 and PW6 with the plaintiff, their evidence had to be viewed with caution as they did not appear to be independent or neutral witnesses. A pertinent fact is that although PW6 was furnished with a copy of the purported resolution, it was not referred to anywhere in any of the letters to the bank which instead focuses on the issue of mandate and the alleged missing cheque book.

[49] We now turn to how the LHCJ had resolved the issues in dispute and evaluated the conflicting versions in this case after a lengthy trial that lasted about 21 days.

[50] As for the issues arising for determination, the LHCJ summarised the same precisely as follows:

(a) whether the defendants had agreed that the plaintiff is to receive RM16m from the sale of the plaintiff's shares in Greengage and the shares of CCH in Buntar Quarry;

(b) whether the defendants' signatures on the 'Members' Written Resolution Made Pursuant to s 297 of the Companies Act 2016 dated 15 March 2017 were obtained fraudulently and/or the resolution is illegal, null and void and is against public policy;

(c) whether the defendants' counterclaim ought to be allowed; and

(d) whether the sum of money injuncted by the court ought to be distributed to the plaintiff and the defendants in accordance with each party's shareholding in Greengage and Buntar Quarry.

[51] She also held correctly that the resolution as per para 10 of the statement of claim ('SOC') formed the basis of the plaintiff's claim.

[52] Before arriving at her finding on the validity of the resolution, the LHCJ was, in our view, justified in scrutinising the material facts surrounding the passing of the resolution which are, briefly, these:

(a) PW1 was the person who prepared the circular resolution allegedly on instructions of R1 (DW1) by telephone that all the shareholders had agreed to sell the companies for RM30m and that the defendants agreed the plaintiff will get RM16m;

(b) PW1 prepared the resolution on 15 March 2017 which he claims was signed by the defendants in front of him whereas the plaintiff signed later;

(c) DW1 denied having signed the resolution before PW1 but alleged that DW2 brought a stack of documents for him to sign the contents of which he was not aware; and

(d) he (DW1) only knew about the resolution later at the bank on 9 June 2017 upon being shown by PW6.

[53] DW1 testified that he only knew about the contents when his son explained the same to him as he does not understand English. This was only a few days later following which he lodged a police report alleging that the plaintiff had cheated him in procuring the resolution. Under cross-examination, PW1 the company secretary, conceded that:

(a) there was no agenda and physical meeting between the shareholders before the resolution was issued out;

(b) he never saw the plaintiff and the defendants face to face before issuing the resolution. The resolution was done by a mere phone call only;

A (c) at the informal meeting in February 2017 between the plaintiff, defendants and other shareholders, the defendants disagreed to the plaintiff getting RM18m because the plaintiff's share is only 20%;

(d) the main contributor to the companies was D1;

B (e) D1 has said at the informal meeting that the bumiputra lot cannot be given to non bumiputra;

(f) D1 could not have agreed to pay RM16m to the plaintiff;

C (g) cl 3 of the sale and purchase agreements ('SPAs') says distribution is per the shareholding;

(h) second para of the resolution is inconsistent with cl 2.1.2 of the SPA; and

(i) if the intention of the parties is for the plaintiff to get RM16m, it could and should be put in the SPA.

D

[54] Due regard was also given by the LHCJ to several admissions made by the plaintiff (PW3). Amongst others, that his contribution to the share capital of Greengage did not amount to RM16m. Secondly, he himself did not hear E that the defendants approve the terms of the resolution. It was only PW1 who told him about this approval. As to the sale price of RM30m, he never agreed to it. Importantly, that if the distribution of the proceeds was based on shareholding, his claim for RM16m had no basis. Thirdly, any debt owing to anyone is as per the SPA. Neither does the resolution mention that Greengage F owes a debt to CCH.

[55] We share the view of the LHCJ that due emphasis must be given to the undisputed fact that the plaintiff's entitlement based on his shareholding was only about RM5.7m whereas his claim of RM16m was RM10m more than G that. The plaintiff himself had conceded at the trial that the claim his no basis based on shareholding.

[56] As to the LHCJ's finding that PW1 was not a credible witness, it was on the premise that he put himself in a position of conflict where despite having H been appointed as a professional he did not appear to have acted professionally but was working hand in glove with the plaintiff to the detriment of the other shareholders. We do not see any serious flaw in the reasoning of LHCJ as to why PW1 should be viewed as a witness who was not credible and neutral, whose evidence had to be viewed with caution.

I

[57] Likewise, we do not find any obvious flaw in the LHCJ's view that the defendants as registered shareholders of Greengage and Buntar Quarry were the vendors of the properties and were entitled to receive payments of the purchase price in accordance with their respective shareholding. An

apportionment based on shareholding in view of the grave doubts as to the existence of the alleged oral agreement and the resolution would produce a just and fair result under the circumstances. We do not consider this view of the LHCJ unjustified and erroneous considering cll 3 and 2.4 of the written agreements ('SPAs') concerning the manner of distribution of the proceeds of sale.

[58] Pertinent questions in our view were considered by the LHCJ in deciding whether it was credible or probable for the defendants to have agreed to give RM16m from the proceeds of the sale as per the terms of the resolution. As rightly noted in her analysis of the facts, the terms of the SPA, which were binding on the parties were clear as to the apportionment of the proceeds among the shareholders. Hence, it was totally justified for the LHCJ to find that it was most unlikely and incredible for R1 and R2 to have agreed to part with whopping RM16m from the price of RM30m to the plaintiff which would have the effect of them losing their entitlements according to their shareholding and the terms of the written agreement. As correctly observed by the LHCJ, if the plaintiff's version is to be sustained, R2 would stand to receive practically nothing. As such, it should be considered as an outcome in defiance of logic.

[59] Likewise, it was not wrong for the LHCJ to hold that the terms of payments mentioned in the resolution are most unfair and may create tension and hatred between the defendants and the plaintiff. The said terms are in direct contrast to the intention of the parties reflected in the SPA and therefore, the resolution should be considered null and void.

[60] There was then the plaintiff's allegation that his claim of RM16m included a certain debt owed by the two companies to him and to one CCH. In this regard, the terms of cl 5.3(c) of the SPA have to be scrutinised. For case of reference, cl 5.3(c) provides as follows:

> (c) The Vendor have made loans to the Company and such loan to date remain outstanding and due and owing to the Vendor (if any) by the Company for various reasons and presently remaining in the accounting records of the Company as due and payable to the Vendor as at to date, the Vendor hereby agree to assign all the monies due to them as aforesaid to the Purchaser absolutely in accordance with the percentage of the sale share acquired by each of the purchaser upon the terms of this Agreement.

[61] From a plain reading of cl 5.3 above, which the LHCJ correctly adopted, the agreement of the vendor (plaintiff) was explicitly clear as to the debts due and payable by the company to him. On this point, the LHCJ did not, in our view, make a wrong finding that, in view of cl 5.3, the plaintiff cannot now via his claim seek to recover monies allegedly due to him from the

two companies having agreed to absolutely assign all the said debts to the purchaser. Assuming that the plaintiff could be said to be entitled to claim debts owed to him by the companies, the LHCJ found, based on the evidence before her that he had failed to prove that the said debts amounted to more that RM10m to justify his claim of RM16m. We see no valid reason to disturb this finding of fact that was purely premised on evidence before the court that was found to be wanting.

[62] There was also an important finding regarding Lot 5065, the bumiputra lot, which was part of the joint venture land. The LHCJ held that it was against public policy and possibly, also illegal, for this particular lot to be transferred to a non-bumiputra. We have not been shown by the appellant to our satisfaction that this is an erroneous view. Furthermore, Lot 5065 did not belong to the defendants. Hence, it did not make sense for them to have agreed or promised to give the same to the plaintiff pursuant to the agreement as spelt out in the purported resolution. This is another reason why the LHCJ found the resolution to be null and void and of no legal effect. Based on the factors that LHCJ had alluded to and the overall evidence cumulatively, she cannot be faulted for having come to this firm conclusion.

[63] We would now proceed to deliberate on the principal grounds advanced by the appellant in contending that the High Court had come to a conclusion that was plainly wrong on the totality of the evidence and had failed to correctly apply relevant principles of law.

[64] Briefly, the appellant submitted that there were several manifest errors in the judgment of the LHCJ in arriving at her decision following the trial. First, that she had erred in law and fact in failing to hold that:

(a) the circular resolution dated 15 March 2017 ('the resolution') signed by the parties constitutes prima facie evidence of the defendants' agreement that the plaintiff was to be paid RM16m for the sale of his and his family company Chia Cheng Ho Sdn Bhd's shares in the two companies. See:

(i) *Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 All ER 631; and

(ii) *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 (IA(P): Tab referred).

(b) the burden falls on the defendants to prove their allegation that their signatures on the resolution were obtained by fraud (s 102, Illustration (b) of the Evidence Act 1950).

[65] Second, that it was the LHCJ's preconception with shareholdings that led her to wrongly remark that shareholding and entitlement carry the same meaning. The preconception was said to have originated at the interlocutory

stage and maintained right up to the conclusion of the trial which was manifested in the decision to hold that the only sensible way for apportionment of the proceeds of sale was according to each party's shareholding. It was contended to be a misdirection because no conclusive finding of fact should have been made at the interlocutory stage. Also, that based on the same preconception, the LHCJ had gone on to find that PW1 was not a credible witness as evident from several adverse remarks made against PW1. It was submitted that she had failed or neglected to consider the entirety of the evidence in the plaintiff's favour as to the agreement to share the proceeds of sale being not in accordance with their respective shareholdings which had occasioned a miscarriage of justice. The LHCJ was also said to have failed to consider the overall evidence in its totality, to understand the background and the true nature of the transactions, and to take into account the private agreement and arrangement between the parties as family members on their respective entitlements to the proceeds of the sale.

[66] Third, that the LHCJ had misconstrued the provisions of the sale and purchase of shares agreements ('SPAs') particularly as to the intention of the parties expressed in cl 2.4 of the agreements. The effect of the misconstruction was said to be that the learned judge was rewriting SPAs by reading into them what was not there based on her own preconception. Her decision is not supported by the clear wording of the said provisions. Instead, the mode of payment as provided by cl 2.4, that is, by cheques to be deposited into a joint account of the three brothers, supports the plaintiff's version that parties had a separate agreement as to how to distribute the proceeds.

[67] Fourth, that following from the same misconception, the LHCJ wrongly held that it was impossible and incredible for D1 and D2 to have agreed to part with RM16m for the plaintiff. The finding was, according to the appellant, not based on DW1's demeanour or in relation to his denial being 'an honest answer' but stems from the said misconception that led to a wrong view being formed.

[68] In essence, it was submitted that the LHCJ ought to have taken a right approach and, ascertained the parties' agreement first from the totality of the evidence before reaching the conclusion as to their respective entitlements.

[69] The plaintiff's position based on the totality of the evidence was in gist this:

> From the evidence, the plaintiff has explained why he asked for RM16 million despite only holding 20% shares. In summary, he said this. First, the shares worth much more than the selling price as Greengage ['GSB'] owned quarry lands worth more than RM30 million. Second, only the plaintiff and the first defendant had contributed monies for the purchase of the quarry land. Fourth, the sum of RM16

A million was inclusive of the debts owing from GSB and BQ to the plaintiff and CCH. Fifth, willing buyer, willing seller. It is his right to fix the price for which he was prepared to sell his shares.

B **[70]** His contention was that both D1 and he were not only selling their shares but were in pith and substance also selling the debts owed to them by the companies respectively which the LHCJ failed to take into account. The purported debts were said to be supported by indisputable contemporary documentary evidence.

C **[71]** We were also urged to bear in mind that Greengage and Buntar Quarry were essentially family companies' owned by the brothers. Hence, in reality, their actual shareholdings in the companies can be seen as the respective capital/advances/loans that they had each contributed.

D **[72]** Viewed from the perspective of the brothers' total contribution to the companies' share capital, it was submitted that in reality, the plaintiff's actual shareholding/contribution in Greengage and Buntar Quarry was 55.70% and not merely 19% and the promise of RM16m (which D1 calculated to be E 53.33%) was fair and reasonable.

[73] As to the LHCJ's reasoning in regard to the crucial cl 5.3(c) of the SPAs, her interpretation was purportedly erroneous for these reasons:

F (a) firstly, her interpretation does not make any commercial sense. It is the reverse of the clear intention of the parties that they were selling their shares together with the companies' debts due to them, if any, and as such, their respective entitlement to the proceeds cannot be measured by their shareholding alone; and

G (b) secondly, that she has wrongly required the plaintiff to prove that the companies owed him more than RM10m in order to justify his claim for RM16m. She has failed to appreciate that the parties' monetary contribution can be translated into and measured in terms of percentage/ratio especially when dealing with what is fair, reasonable and H equitable. As seen above, the two companies were basically family companies and the ratio of the plaintiff's total contribution to the two companies as compared to the defendants would have justified a claim for 55.70% of the total declared selling price of RM30m which would have been more than RM16m.

I **[74]** Lastly, it was contended that the LHCJ's view on the alleged agreement as to the bumiputra lot (Lot 5065) was also erroneous due to a misconstruction of the resolution. From a proper reading of the resolution, she should, it was resubmitted:

(a) it is impossible for the parties to have agreed that the defendants or Greengage who did not own Lot 5063 should transfer the said lot to the plaintiff; and

(b) hence, the intention of the parties was clear. The only correct conclusion is that the parties who jointly owned 100% shares of Greengage had agreed for Greengage to assign its joint venture right of Lot 5065 to the plaintiff.

[75] The appellant, for the record, brought to our notice that Lot 5065 or the joint venture rights to it was not part of the present claim.

[76] In view of the several issues and facts raised by the plaintiff, his position was that the learned trial judge had erred in failing to judicially appreciate or evaluate the evidence before her; in drawing wrong inferences; and in failing to draw proper inferences from the evidence and take the benefit of audio visual advantage of hearing and seeing the witnesses in deciding this case.

[77] In deliberating whether the LHCJ had rightly rejected the plaintiff's claim for failure to prove his case we have to be mindful of the law on burden of proof on the party bringing a claim wherein pursuant to s 101 of the Evidence Act 1950, it is clearly set out that:

> 101 Burden of proof.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[78] Our attention was drawn to the case of *Tan Ah Kow & Anor v Tan Chaui En* [2017] 6 MLJ 297; [2018] 2 CLJ 610 where the Court of Appeal in allowing the appeal had held that:

> (1) Based on the totality of evidence adduced before the High Court, there was no evidence of an oral agreement to sell the 1/3 share of the first appellant in the ten lands and the three lands, which were wholly-owned by the first appellant, to the respondent at a purchase price of RM420,000 ...
>
> (3) ... Although the POA came under the ambit of the Powers of Attorney Act, 1949, it was the Contracts Act, 1950 which applied in view of the respondent's contention that the POA could be treated as the alleged SPA reduced in writing. Therefore, the POA could not stand as it had vague terms and discrepancy of definitions. It was void for uncertainty, as provided under s 30 of the Contracts Act 1950. The respondent had no right to use the POA, which was not an SPA, to transfer the first appellant's 1/3 share in the ten lands to himself.

[79] We have taken cognisance of the trite principle that findings of fact based on witnesses' credibilities, evaluation of their evidence and assessment of their truthfulness are within the purview of the trial judge having an audio-visual advantage. Unless the findings are perverse, contrary to totality of the evidence or a plain misdirection, the appellate court which does not have the said benefit would be loathe to interfere with the same.

[80] Notwithstanding some significant issues that were put forth by the appellant highlighting the purported misconstruction of the resolution and cl 5(3) of the SPAs and the perceived preconception by the LHCJ in regard to shareholding, we should not lose focus that the substratum of the pleaded claim, which was the alleged oral agreement that was put in writing via the resolution. Central to the plaintiff's case was that the proceeds of sale were to be distributed strictly in accordance with the terms of the oral agreement regardless of the parties' shareholding and express terms of the SPAs. The determination of this central issue depended primarily on the credibility of the parties themselves and their material witnesses who were seen and heard by the LHCJ. In our considered view, the matter in dispute revolved substantially on questions of fact to be determined by the LHCJ from a proper evaluation of the evidence and the respective versions. In this context, the central question that we have to ask ourselves is whether the LHCJ had gone completely wrong in her findings of fact and approval of the evidence that led to an erroneous conclusion as to the sustainability of the claim.

[81] We have to emphasise that this family dispute went through a 20 day full trial wherein many witnesses testified before the LHCJ. PW1 was an important and material witness in support of the plaintiff's case was found by the LHCJ not to be a credible witness for reasons stated which we do not find to be perverse or outrageous for our intervention. From her observation and the contradictory evidence that he had given, his impartiality and neutrality were called into question which we do not consider to be an unreasonable or a manifestly wrong observation.

[82] We have given adequate consideration to the crucial finding of the LHCJ that the alleged oral agreement that was subsequently recorded in the purported resolution was not proved by the plaintiff to have been in existence at the point in time or at any time. This is a pure finding of fact based on witnesses' testimonies and documentary evidence. To reiterate, she found material discrepancies and inconsistencies between the said agreement and the resolution which were not resolved at the trial. The resolution was also found to be incomplete, and lacking in material particulars that failed to support the plaintiff (PW3)'s claim for RM16m.

[83] Amongst others, the resolution was silent on certain key aspects of

PW3's claim which meant that the alleged oral agreement on which his claim was pursued could, in all probability, not have been in existence, as otherwise, all the agreed vital terms would have been captured in the resolution.

[84] We do not propose to go further into the reasons advanced by the LHCJ for her conclusion on the alleged oral agreement which we have earlier addressed at length except to state that, in our view, her conclusion is based on a proper and reasonable appraisal of the evidence and not contrary to the weight of the overall evidence on the issue at hand.

[85] We would, however, stress that the plaintiff's own key witness, PW1 himself had confirmed that two shareholders of Buntar Quarry, CYL and CCH were not even named in the resolution which they had not signed. It meant that they had not agreed to it and created further doubts as to its very existence.

[86] PW3's credibility was also found to be wanting, particularly due to his conflicting versions and changing stances in respect of a vital issue, ie, the joint venture rights in respect of the bumiputra lot. Neither was the bumiputra lot mentioned in the resolution and as such, the truth of his version that the oral agreement was reproduced in the resolution was left in doubt. PW3 himself, who was the party that bore the onus of proving his case gave conflicting evidence about the joint venture right to the bumiputra lot that was not even mentioned in the purported resolution or the alleged oral agreement when he was questioned about it. Despite this fact, he maintained his claim for the said joint venture right.

[87] Apart from the unresolved discrepancies between PW3's testimony and the relevant documentary evidence, we also take serious note of an important fact highlighted by R2 that the purported resolution is silent on any RM100,000 owed to CYL but the appellant/plaintiff alleged that the sum of RM16m to be paid to the appellant/plaintiff was after paying CYL RM100,000.

[88] A salient fact that also assumed significance was that the SPAs, the contemporaneous documents and the parties' 'conduct at the material time all pointed to an agreement that the proceeds of sale of shares in Greengage and Buntar Quarry were to be distributed based on shareholding percentages of the respective shareholders of the two entities and nothing else.

[89] Another vital fact brought to our attention was that the alleged oral agreement and the purported resolution further contradict the resignation letters dated 10 July 2017 of the appellant/plaintiff as the director of GSB and BQ, wherein the appellant/plaintiff confirmed that he had no claims whatsoever on the company or any directors of the company. It is plainly

inconsistent with the purported resolution which mentions that the consideration to the plaintiff is 'inclusive of debt'.

[90] Under the resolution, the RM16m consideration to him comprised the debts then owing to him and joint venture right to Lot 5065 whereas both the resignation letters and the oral agreement disclaim any debts owing by the company. Upon reviewing the evidence as a whole and the reasons for the LHCJ's finding, we are in complete agreement with the LHCJ that the plaintiff had failed to prove the existence of the alleged oral agreement pursuant to s 101 of the Evidence Act 1950 as, amongst others, the purported resolution does not support the alleged oral agreement at all.

[91] As to the finding that the purported resolution is illegal, null and void and contradictory to public policy, the respondents contend that LHCJ's view is correct in law.

[92] From our perusal of the material evidence of both the plaintiff and the defendant that was highlighted to us, the proven and the undisputed facts, we could not find any serious error in the finding of fact by the LHCJ that the purported resolution must in all probability have been fraudulently obtained. Primarily, the finding was because it did not contain the vital term as to the percentage or proportion to be shared between the defendants, the terms are grossly unfair to the defendants and they are also in direct contrast to the terms as intended by the parties in the SPAs which the plaintiff had voluntarily executed without reservation as well as in contradiction with the pleaded oral agreement. The LHCJ's finding was fortified by the fact that the plaintiff had failed to prove that the companies owed him more that RM10m to justify his claim of RM16m.

[93] We are also in agreement with the respondents' contention that the LHCJ had correctly interpreted the purported resolution and considered the pleaded oral agreement in concluding that the terms of the agreement and the resolutions were riddled with inconsistencies.

[94] More importantly, the LHCJ found the purported resolution in its entirety to be illegal, null and void. Without touching further on the alleged transfer of the bumiputra lot to a non-bumiputra which the appellant contended was misconceived, R2 brought to our attention several facts that pointed to statutory non-compliance by PW1 in respect of the impugned resolution.

[95] Foremost amongst these is that it was not circulated to all eligible members to be signed. The purported resolution was clearly for the shareholders of both Greengage and Buntar Quarry which are in law separate

and distinct legal entities, having different shareholders and directors.

[96] In our view, R2 was correct in contending as follows:

> In the purported resolution, it is clearly stated that it is pursuant to Section 297(1) of Companies Act 2016 and further refers to Section 298(1) of Companies Act 2016 which clearly requires all the eligible members to sign the resolution and Chan Wah Chong (PW1) has confirmed during cross-examination that the resolution must be circulated to all the eligible members to sign. However, Chong Yoke Loong ('CYL') and Chia Cheng Ho Sdn Bhd ('CCH') being separate legal entities and eligible members, are not even named in the purported resolution and they also did not sign the resolution.

[97] Hence, the breach of s 298(1) of the CA had been proved which rendered it not binding on and not enforceable, against all the shareholders of Greengage and Buntar Quarry.

[98] On this point, we agree with the contention of R1 as follows:

> A perusal of the alleged resolution would reveal that it purportedly is for both the shareholders of GSB and BQ. However, GSB and BQ are separate and distinct legal entities and as such, the purported resolution cannot in any way be for or bind, the shareholders of BQ to the alleged agreement.
>
> It should also be noted that the shareholders of GSB and BQ are not common. Whilst the shareholders of GSB are the Plaintiff, the Plaintiff is not a shareholder in BQ which also has two other shareholders ie. CYL and CCH Sdn Bhd, apart from GSB.
>
> The Plaintiff had failed to produce any resolution from BQ regarding the alleged agreement that the Plaintiff should get RM16 million and Lot 5065 from the sale of GSB and BQ.

[99] Neither had PW3 produced any confirmation of agreement and or consent from CYL as to the alleged agreement. Despite having initially intended to call CYL as his witness to support his version, PW3 subsequently decided against it to the detriment of his case.

[100] As regard the important issue raised by the appellant concerning the LHCJ's purported misconstruction, we are not persuaded by the appellant's proposition that the LHCJ had wrongly/erroneously construed cl 5.3(c) of the SPAs as illustrated in the respondents' submissions. If the plaintiff was to be entitled to have the alleged debts to him to be taken into account when calculating his entitlement, then surely it would have been expressly stated as such in the SPA. Instead all such debts were assigned to his Purchaser. Hence, the LHCJ was right to reject the plaintiff's contention regarding the same.

[101] In the Supreme Court case of *Kelapa Sawit (Telok Anson) Sdn Bhd v Yeoh Kim Leng & Ors* [1991] 1 MLJ 301 in regard to a resolution running foul of the company's articles of association, Jemuri Serjan SCJ (later CJSS) held that:

> In view of the requirements in art 54, the resolution, therefore, was invalid and inefflectual because of the non-compliance thereof. See *Re Bonelli's Telegraph Co* (1871) LR 12 Eg 246. In *Re Monitronix* (1987) 12 ACRL 151, an application was made under s 122(1) of the Companies (WA) Code to validate the purported issue and allotments of shares because the directors never met for the purpose of the allotments of shares and, besides, the resolutions were not signed by all the current directors of the company concerned. The issue on the validity of the approval and the resolution was not specifically decided but it was implicit that the validation order sought was because of the invalidity of the resolutions. It is observed that s 63 of our own Companies Act 1965 is in pari material with s 122(1) of the Code.

[102] Based on the overall factual matrix of this case, we concur with the contention of R1 which was substantiated by unrebutted evidence, that there were unresolved inconsistencies between the terms of the purported resolution and the alleged agreement as pleaded. It supported R1's proposition that the alleged agreement was an afterthought to validate a resolution that was unlawfully procured. The LHCJ found it to have been fraudulently obtained on credible grounds. In our view, the finding was not plainly wrong to justify our intervention.

[103] We are not persuaded by the appellant that the LHCJ came to an incorrect finding that the agreed distribution of the proceeds of sale was in accordance with the respective shareholding percentages. As accurately summed up by R1:

> A perusal of SPA, contemporaneous documents and conduct of parties would confirm that the distribution of proceeds of the sale of shares in GSB & BQ is based on the shareholding percentages of the respective shareholders of GSB and BQ as prescribed in Recital 3 of the SPA.

CONCLUSION

[104] In view of the foregoing, we would conclude that the LHCJ had properly utilised the audio-visual advantage that she had and had kept in mind relevant considerations based on the totality of the evidence and had not taken into account any irrelevant considerations in arriving at her decision. She had also applied the correct principles of law in evaluating the evidence and credibility of witnesses. The appellant in our view, had not demonstrated to us that the LHCJ had misdirected herself as contended. Neither was it shown that she had failed to judicially appreciate and evaluate the evidence.

[105] We, therefore, find that there was no plain error of law or fact by the LHCJ in deciding to dismiss the appellant's claim and allow the respondents' counterclaim that would warrant our intervention on appeal. We, accordingly, find no merits in this appeal and dismiss the same with costs.

Appeal dismissed with costs.

Reported by Nabilah Syahida Abdullah Salleh